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263 NLRB No. 105

D--9166
Neptune, NJ

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

JERSEY SHORE MEDICAL CENTER

and

Case 22--CA--11478

HOSPITAL PROFESSIONALS AND ALLIED EMPLOYEES OF NEW JERSEY, AMERICAN FEDERATION OF TEACHERS, AFL--CIO

DECISION AND ORDER

Upon a charge filed on March 11, 1982, and amended on April 18, 1982, by Hospital Professional and Allied Employees of New Jersey, American Federation of Teachers, AFL--CIO, herein called the Union, and duly served on Jersy Shore Medical Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on April 21, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 30, 1981, following a Board

election in Case 22--RC--8473, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about December 21, 1981, and, at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. The complaint further alleges that commencing on or about January 1, 1982, and at all times material herein to date, Respondent unilaterally changed existing wage rates, hours of employment, sick leave policy, vaction policy, tuition reimbursement policy, overtime policy, holiday policy, and other terms and conditions of employment of the unit employees. On April 30, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 21, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 26, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment

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[1] Official notice is taken of the record in the representation proceeding, Case 22--RC--8473, as term ''record'' is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

should not be granted. Respondent therafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain and its unilateral change of terms and conditions of employment, but challenges the Union's certification on the basis that the Board erred in certifying the Union as the exclusive bargaining representative of Respondent's employees. In the Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case and, also, that no factual issues in the case warrant a hearing.

Our review of the record herein, including the record in Case 22--RC--8473, discloses, inter alia, that on March 30, 1981, the Union filed a petition seeking to represent certain employees of Respondent. On May 22, 1981, the Regional Director issued a Decision and Direction of Election in which he determined that the following employees constitute an appropriate unit:

> All full-time and regularly scheduled part-time registered nurses employed at Respondent's Neptune, New Jersey facility, including graduate nurses, charge nurses, nurse anesthetists, in-service instructors, IV nurses, PSRO co-ordinators, nursing audit nurses, infection surveillance nurses, and hospice nurses, but excluding all other professional employees, technical employees, service and maintenance employees, business office clerical employees, managerial employees, guards, the Director and Assistant Director of Nursing, nurse supervisors, nurse co-ordinators, head nurses, assistant head nurses and all other supervisors as defined in the Act.

An election was held on June 18, 1981, pursuant to the Decision and Direction of Election.

The tally of ballots furnished the parties shows 107 votes for the Union, 32 votes for Teamsters, Local 97 of New Jersey a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 126 votes were cast against participating labor organizations, and 6 votes were challenged, a number insufficient to affect the outcome. Because no party received a majority of the valid votes cast plus challenged ballots cast, a run-off election was held on August 27, 1981. The tally of ballots from the run-off election shows 124 votes for the Union, 107 votes against, with 10 challenged ballots, a number insufficient to affect the outcome. A tally was served on all parties showing that a majority of ballots were cast for the Union. Respondent filed timely objections to conduct affecting the election alleging, among other things, that the Union made material misrepresentations in its campaign literature to which Respondent had insufficient time to respond. Specifically, Respondent contends that the Union misrepresented the salary schedule negotiated at a neighboring hospital and that

Respondent received the campaign literature only 1 day before election. On November 30, 1981, the Regional Director issued Supplemental Decision and Certification of Representative overruling the objections. The Regional Director noted that t statements in issue did not constitute ''a substantial depart from the truth'' and, even if they did, the mailing date for campaign literature was sufficiently before the election to a Respondent to answer any union claims.

Respondent field a request for review of the Regional Director's Supplemental Decision contending, inter alia, that there was a factual dispute as to when Respondent learned of union statements which mandated a hearing. On March 10, 1982, Board denied the request finding that the statements were not material misrepresentations. Respondent then filed a request reconsideration arguing that both the character of the stateme and the question of timing should be resolved through a heari The Board denied the request on April 7, 1982.

On December 21, 1981, the Union requested that Respondent recognize and bargain collectively with it. Since on or about December 21, 1981, Respondent refused and continues to refuse recognize and bargain with the Union. On or about January 1, 1982, and subsequently, Respondent unilaterally changed wages, hours, and other terms and conditions of employment without consulting, notifying, or bargaining with the Union.

In its answer to the complaint, and again in its response the Motion for Summary Judgment, Respondent admits that it refused to bargain collectively with the Union whose

certification it disputes and that it made the unilateral changes alleged in the complaint. In its defense, Respondent reiterates its contentions concerning the Union's campaign literature which was the subject of its objections. As these issues were addressed in the underlying representation case, Respondent is attempting to raise issues herein which were previously litigated.

Respondent, however, asserts that new and previously unavailable evidence indicates a greater magnitude of misrepresentation by the Union which warrants a hearing. The evidence alleged to be newly discovered consists of a copy of the collective-bargaining agreement which was the subject of the Union's campaign literature. Respondent offers nothing to show why this contract was previously unavailable or otherwise newly discovered. In these circumstances, we conclude that Respondent has not presented newly discovered or previously unavailable evidence.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege

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[2] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, a New Jersey corporation, whose principal place of business is at 1945 Corlies Avenue, Neptune, New Jersey, is engaged at that location in the business of providing and performing medical, educational, and related services. In the course and conduct of Respondent's business operations during the preceding 12 months, said operations being representative of its operations at all times material, Respondent received gross revenues valued in excess of $250,000. During the same period of time, Respondent caused to be purchased, transferred, and delivered to its Neptune facility medical equipment and other goods and material valued in excess of $50,000 which were transported to its facility in interstate commerce directly from States of the United States other than New Jersey.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act,

and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Hospital Professionals and Allied Employees of New Jersey, American Federation of Teachers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regularly scheduled part-time registered nurses employed at Respondent's Neptune, New Jersey facility, including graduate nurses, charge nurses, nurse anesthetists, in-service instructors, IV nurses, PSRO co-ordinators, nursing audit nurses, infection surveillance nurses, and hospice nurses, but excluding all other professional employees, technical employees, service and maintenance employees, business office clerical employees, managerial employees, guards, the Director and Assistant Director of Nursing, nurse supervisors, nurse co-ordinators, head nurses, assistant head nurses and other supervisors as defined in the Act.

2. The certification

On August 27, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 30,

and that it will effectuate the policies of the Act to assert jurisdiction herein.

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2. The certification

On August 27, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 22, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 30,

1981, and the Union continues to be such exclusive representative within the meaning of Section 9(c) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about December 21, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the the above-described unit. Commencing on or about December 21, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Commencing on or about January 1, 1982, and at all times material, Respondent changed existing wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, holiday policy, and other terms and conditions of employment of the unit employees without consulting, notifying, or bargaining over such changes with the Union.

Accordingly, we find that Respondent has, since December 21, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. We further find that since January 1, 1982, and at all times thereafter, Respondent unilaterally changed the terms and

conditions of the unit employees as described above, and that, by such action, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Jersey Shore Medical Center set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. We shall further order that Respondent, upon request, rescind all unilateral changes made in terms and conditions of employment of unit employees since January 1, 1982, and make whole the unit employees for any monetary loss resulting from those changes, computed in the manner provides in F. W. Woolworth Company, 90 NLRB 289 (1950), with interest in accord with Florida Steel Corporation, 231 NLRB 651 (1977), and Isis Plumbing & Heating Co., 138 NRLB 716 (1962).

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Jersey Shore Medical Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hospital Professionals and Allied Employees of New Jersey, American Federation of Teachers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regularly scheduled part-time registered nurses employed at Respondent's Neptune, New Jersey facility, including graduate nurses, charge nurses, nurse anesthetists, in-service instructors, IV nurses, PSRO co-ordinators, nursing audit nurses, infection surveillance nurses, and hospice nurses, but excluding all other professional employees, technical employees, service and maintenance employees, business office clerical employees, managerial

employees, guards, the Director and Assistant Director of Nursing, nurse supervisors, nurse co-ordinators, head nurses, assistant head nurses and other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 30, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 21, 1981, and at all times thereafter, to recognize and bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and by changing existing wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, overtime policy, holiday policy, and other terms and conditions of employment of the unit employees, without consulting, notifying, or bargaining with the above-named labor organization over such changes, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain and unilateral changes, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the

Act, and thereby has engaged in and engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jersey Shore Medical Center, Neptune, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital Professionals and Allied Employees of New Jersey, American Federation of Teachers, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regularly scheduled part-time registered nurses employed at Respondent's Neptune, New Jersey facility, including graduate nurses, charge nurses, nurse anesthetists, in-service instructors, IV nurses, PSRO co-ordinators nursing audit nurses, infection surveillance nurses, and hospice nurses, but excluding all other professional employees, service and maintenance employees, business office clerical employees, managerial employees, guards, the Director and Assistant Director of Nursing, nurse supervisors, nurse co-ordinators, head nurses, assistant head nurses and other supervisors as defined in the Act.

(b) Changing existing wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, overtime policy, holiday policy, and other terms and conditions

of employment of the unit employees, without consulting, notifying, or bargaining with the above-named labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole the employees in the appropriate unit for any monetary losses they may have suffered as a result of unilateral changes made in wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, overtime policy, holiday pay, and other terms and conditions of employment.[3]

(c) Upon request, rescind all changes in existing wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, overtime policy, holiday policy, and other terms and conditions of employment of unit employees which were made since on or about January 1, 1982.

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[3] In accordance with his dissent in Olympic Medical Corporation, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

(d) Post at Jersey Shore Medical Center copies of the attached notice marked ''Appendix.''[4] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 30, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hospital Professionals and Allied Employees of New Jersey, American Federation of Teachers, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT change existing wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, overtime policy, holiday policy, and other terms and conditions of employment without consulting, notifying, or bargaining with the above-named Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regularly scheduled part-time registered nurses employed at our Neptune, New Jersey facility, including graduate nurses, charge nurses, nurse anesthetists, in-service instructors, IV nurses, PSRO co-ordinators, nursing audit nurses, infection surveillance nurses, and hospice nurses, but excluding all other professional employees, technical employees, service and maintenance employees, business office clerical employees, managerial employees, guards, the Director and Assistant Director of Nursing, nurse supervisors, nurse co-ordinators, head nurses, assistant head nurses and other supervisors as defined in the Act.

WE WILL, upon request, rescind all changes in existing wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, overtime policy, holiday policy, and other terms and conditions of employment made since January 1, 1982.

WE WILL make whole employees in the appropriate unit for any monetary losses they may have suffered as a result of unilateral changes made in existing wage rates, hours of employment, sick leave policy, vacation policy, tuition reimbursement policy, overtime policy, holiday pay, and other terms and conditions of employment.

JERSEY SHORE MEDICAL CENTER

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peter D. Rodino Jr. Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201--645--3652.